



सत्यमेव जयते

आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.
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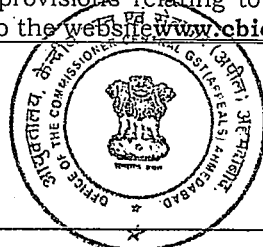


By Regd. Post

DIN NO.: 20230664SW000000E45B

(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/2433/2022 / 1६३७ - ६९
(ख)	अपील आदेश संख्या और दिनांक / Order-In -Appeal and date	AHM-CGST-002-APP-ADC-15/2023-24 and 31.05.2023
(ग)	पारित किया गया / Passed By	श्री मिहिर रायका, अपरआयुक्त (अपील) Shri Mihir Rayka, Additional Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	01.06.2023
(ङ)	Arising out of Order-In-Original No. GST/D-VI/O&A/10/KAUNI/AM/2022-23 dated 28.04.2022 passed by The Assistant/Deputy Commissioner, CGST, Division - VI (S G Highway West), Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Kauni Engineers and Contractors (GSTIN-24AAGFK7969J1ZR), C/113, Ronal Apartment, Near Thaltej Post Office, Thaltej, Ahmedabad, Gujarat-380059

(A)	इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी /प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying -
(i)	(i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to <u>twenty five per cent</u> of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in .



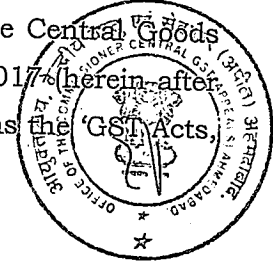
ORDER-IN-APPEAL

BRIEF FACTS OF THE CASE :

M/s. Kauni Engineers and Contractor, C/113, Ronak Apartment, Near Thaltej Post Office, Ahmedabad – 380 059 (hereinafter referred to as “*the appellant*”), holding GSTIN 24AAGFK7969J1ZR has filed appeal against Order-In-Original No. CGST/ D-VI/O&A/10/KAUNI/AM/2022-23, dated 28.04.2022 (hereinafter referred to as the “*impugned order*”) passed by the Assistant Commissioner, CGST & C.Ex., Division-VI, Ahmedabad-North (hereinafter referred to as the “*adjudicating authority*”).

2. The facts leading to this case are that the officers from the Directorate General of Goods and Services Tax Intelligence, Ahmedabad Zonal Unit [AZU], Ahmedabad (hereinafter referred to as ‘*DGGI*’) visited the business premises of *the appellant* on 20.01.2020 in inspection mode. The appellant firm is partnership firm. The appellant are engaged in the business of manpower recruitment agency services, construction services in respect of commercial or industrial buildings and civil structures, construction of residential complex, work contract services etc. The building construction company enters into a “Work Order Agreement” with the appellant firm, as per the work, the construction company appoints the appellant firm as a “Contractor” for the construction work such as RCC labor work, brick work, plaster work etc at their various projects. The said activities undertaken by the appellant qualify as taxable services in terms of Section 2(108) read with the definition of “Service” as given under Section 2(102) read with Section 7(1) of the CGST Act, 2017 *ibid*.

During the inspection visit of officers of *DGGI*, it was noticed that *the appellant* has filed GSTR-1M for the period July-2017 to December-2019 but not filed GSTR-3B for the period from April-2019 to December-2019 and also not paid the GST liability amounting to Rs. 32,43,386/- for the period from April-2019 to December-2019. After initiation of inquiry, the appellant paid Rs. 32,43,386/- towards their GST liability out of which Rs. 2,58,140/- through ITC and paid Rs. 29,85,246/- through cash towards part payment of their remaining liability vide various challans. Therefore, *DGGI* initiated proceeding by issuing a Show Cause Notice F. No. DGGI/ AZU/ 36-34/ 2021-22, dated 30.06.2021 demanding CGST amount of Rs. 16,21,693/- and SGST amount of Rs. 16,21,693/- (Total Rs. 32,43,386/-) under Section 73(1) of the Central Goods and Services Tax Act, 2017 /Gujarat Goods and Services Tax Act, 2017 (herein-after referred to as the ‘CGST Act, 2017/GGST Act, 2017’ and collectively as the ‘GST Acts,



2017), and Rs. 32,43,386/- paid through ITC and cash needs to be appropriated against the said GST liability.

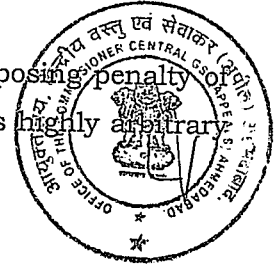
The notice further proposes to demand interest on applicable rates on the CGST; SGST; alleged to their act other than act of suppression and mis-declaration under Section 50 of the CGST/GGST Acts, 2017; and also to impose penalty under Section 73(9), 73(11), 122(1)(iii), 122(1)(iv) & 122(2)(a) of the GST Acts, 2017 for non payment of tax or short-paid tax for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax.

3. *The Adjudicating Authority* vide Order-in-Original No. CGST/ A'bad North/ Div-VII/ ST/ DC/ 181/ 2020-21, dated 28.04.2022 has:

- (a) confirmed the demand of GST of Rs. 32,43,386/- (CGST Rs.16,21,693/- + Gujarat GST Rs.16,21,693/-) for the period from April-2019 to December-2019 under Section 73(1) of the GST Acts, 2017 and ordered appropriation of the same against payment made;
- (b) confirmed the demand of applicable interest on the taxable value of Rs.32,43,693/- under Section 50 of the GST Acts, 2017;
- (c) imposed penalty of Rs.3,24,339/- under Section 73(9) read with section 73(11) of the GST Acts, 2017 and Section 122(2)(a) of the GST Acts, 2017;
- (d) Imposed penalty of Rs. 32,43,386/- under Section 122(1)(iii) of the GST Acts, 2017

4. Being aggrieved, the appellant filed the present appeal on 16.08.2022 on the following grounds:-

- (a) The adjudicating authority has erred in law in passing the impugned order, wherein huge demand under section 73 of GST Acts, 2017 is raised which inter-alia includes penalty u/s 122 of the GST Acts, 2017 and interest amount under section 50.
- (b) The adjudicating authority has erred in law for imposition of penalty under section 122(2)(a) and penalty of Rs. 3,24,339/- under Section 73 of the GST Acts, 2017. The action of the adjudicating authority imposing penalty in absence of any *mens rea*, *contumacious conduct*, *guilty mind* and on recorded transactions is highly unjustifiable and unlawful.
- (c) The adjudicating authority has grievously erred in law in imposing penalty Rs. 32,43,386/- under section 122(1)(iii) of GST Acts, 2017, is highly arbitrary and unreasonable.



- (d) The adjudicating authority has imposed penalty on a higher side as prescribed under section 122 of the GST Acts, 2017 without considering the provisions of the GST law. Since the case pertains to section 73 of the GST Act, imposition of higher side penalty is bad in law and deserves to be deleted;
- (e) The adjudicating authority has also initiated proceedings for demand of interest as applicable rate under section 50 of the CGST Acts, 2017. The appellant is having sufficient ITC available, therefore, interest is not payable and hence proceedings required to be dropped.
- (f) The order has passed without considering the genuine difficulty and financial hardship faced by the taxpayer. On the ground of sufficient and reasonable cause for not filing the GST returns well in time, the imposition of penalty may be deleted. The appellant has not contravened any of the provisions of Section 39, 49, 59, 122 of the GST Acts, 2017. Therefore, imposition of penalty without giving proper opportunity to be heard to the appellant is highly unjustifiable, unlawful and in gross violation of principle of natural justice.
- (g) That in absence of any *mens rea* or *guilty mind* imposition of penalty under section 122(1)(iii) and 122(2)(a) of GST Acts, 2017 may be deleted as imposed on higher side and initiation of recovery of interest may be dropped as appellant is having sufficient credit available.
- (h) They have already deposited interest of Rs. 2,79,536/- vide DRC-03 dated 02.07.2021 on the GST liability of Rs. 32,43,386/- during the disputed period.

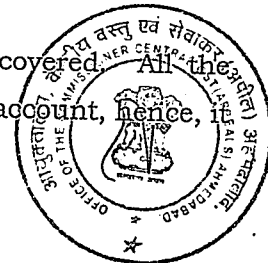
PERSONAL HEARING:

5. Personal hearing in this case was held on 23.12.2022, Mr. Varis V Isani, Advocate, appeared in person, on behalf of the appellant as authorised representative. He requested further 7 days for additional submission and the same was granted to them.

Additional submissions:

5.1 In further written submission dated 29.12.2022, the appellant contended on the following points:-

- (a) It is trite law that without payment of tax challan, taxpayer cannot file and upload GST returns on GSTN portal. All the transactions of sales and purchases are recorded in the books of account and tax payer has maintained their books of accounts as per the provisions of GST law.
- (b) During the inspection, no incriminating documents were recovered. All the sales and purchase transactions are recorded in their books of account, hence, if



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is not a case where taxpayer has suppressed any transactions of sales or avoid any liability of payment of tax.

- (c) As per para 4 of the impugned order the adjudicating authority itself speaks that no defects / detection were found neither in the GST returns filed by the appellant till March-2019 nor any data or sales purchase transactions were found unrecorded. On the date of inspection of DGGI, they worked out GST liability of Rs.32,43,386/- for the period April 2019 to December 2019, this shows that books of accounts of the appellant are updated and recorded on real time basis, except non filing of GSTR-3B returns from April 2019 to December 2019 and no discrepancy was found by the DGGI.
- (d) The appellant have paid GST liability to the tune of Rs. 32,43,386/- (Rs. 258140 paid through ITC + Rs. 29,85,246/- paid cash) on 22.01.2020 (Rs. 587313/-), 28.01.2020 (Rs.340436/-), 11.03.2020 (Rs. 537443/-) and 12.03.2020 (Rs.27,431/-). Also paid interest amounting to Rs. 2,79,536/- vide DRC-03 dated 02.07.2021 towards late payment of GST for the period April 2019 to December 2019. Also paid Rs. 57,510/- towards late fees.
- (e) That this is not a case of any evasion or avoidance of payment of tax. During the visit of DGGI, no incriminating documents found and all the sales and purchase transactions were maintained and recorded in books of accounts, and on the basis of these transactions / data, DGGI had worked out GST liability for the disputed period. Due to certain financial crunch and non-availability of fund, the payment were stuck and therefore not filed their pending GST returns i.e April 2019 to December 2019. Non-filing of GSTR-3B returns does not lead to initiate penalty proceedings under section 122 of the GST Acts, 2017, however, the appellant has already filed their GSTR-1M returns for the period April 2019 to December 2019, before the inspection by DGGI.
- (f) There is no mens rea, contumacious conduct or guilty mind on the part of the appellant for non-payment of tax within 3 months, and relied upon decision of the Apex Court in support of their contention in case of COMMR. OF CUSTOMS (IMPORT) MUMBAI Vs M/S DILIP KUMAR AND COMPANY and others (reported in 2018-TIOL-302-SC-CUS-CB); hence imposition of penalty under Section 122 and Section 73 by the adjudicating authority is not applicable and which is highly unwarranted and unjustifiable as per Circular No. 76/50/2018-GST dated 21st December 2018.

In view of the above submissions the appellant prayed to set aside the OIO and delete the appeal and delete the penalty accordingly.



DISCUSSION AND FINDINGS:-

6. I have carefully gone through the facts of the case and the submissions made by the appellant in their grounds of appeal as well as at the time of personal hearing and find that appellant is mainly contesting the demand and imposition of penalty under Section 73 and 122 of the GST Acts, 2017. According to the appellant, it is a mere late payment and late filing of returns and hence the provisions of Section 73 and 122 of the GST Acts, 2017 are not attracted. So the questions to be answered in the present appeal are

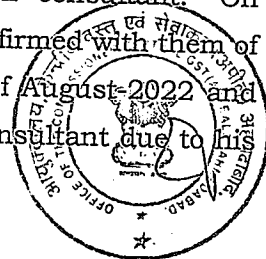
(i) whether the demand of tax and imposition of penalty under Section 73 of the GST Acts, 2017 is proper or otherwise;

(ii) whether interest is payable on the amount of GST liability Rs.32,43,386/- or otherwise; and

(iii) whether penalty is imposable under Section 73 and Section 122 of the GST Act, 2017 or otherwise;

7. At the foremost, I observed that in the instant case the "impugned order" is of dated 28.04.2022 and the present appeal is filed on 16.08.2022. As per Section 107(1) of the CGST Act, 2017, the appeal is required to be filed within three months time limit. I observed that in the instant case the appeal has been filed by delay from the normal period prescribed under Section 107(1) of the CGST Act, 2017. I find that though the delay in filing the appeal is condonable only for a further period of one month provided that the appellant was prevented by sufficient cause from presenting the appeal is shown and the delay of more than one month is not condonable under the provisions of sub section (4) of the Section 107 of the CGST Act, 2017.

In the present case, the 'impugned order' is of dated 28.4.2022 and the same was communicated to the appellant on 28.04.2022 and appeal filed by the appellant on 16.08.2022, with a request to condone the delay. The appellant has requested to delay condone by showing the reason that on receipt of the order passed by the adjudicating authority the appellant has forwarded the said order to his accountant to forward the same to their consultant for further proceedings and seek his advice and guidance in this regard. However, the accountant to whom the said order was given went of "Haj Pilgrimage" and forgot to forward the order to their consultant. On returning of their accountant from Haj Pilgrimage inquired and confirmed with them of filing of appeal against the impugned order in the Second week of August 2022 and accountant confessed that he forgot to forward the same to the consultant due to his



schedule of Haj Pilgrimage, which resulted into delay in filing the appeal by 18 days. In view of the above, in the instant case, I am inclined to condone the delay in filing of appeal for one month period. Therefore, I find that the present appeal is filed within stipulated time limit. Accordingly, I am proceeded to decide the case.

8. I find that the show cause notice proposed to recover the CGST and GGST not paid by the appellant for the period from April-2019 to December-2019. I find that the appellant consequent to visit of DGGI officers on dated 20.01.2020 had filed all the pending GSTR-3B returns for the period from April-2018 to December-2019 on 22.01.2020, 28.01.2020 & 12.03.2020, and accounted for the details of taxable supply made for the period from April-2019 to December-2019 in their books of account. During the inspection on 20.01.2020, the appellant have submitted the following documents to DGGI:

- (1) Sales -Bills / invoices (April-2019 to December-2019);
- (2) Sales Registrar (April-2019 to December-2019);
- (3) Copy of GSTR-1M (April-2019 to December-2019);
- (4) Copy of GSTR-3B (April-2019 to March-2019);

It has been observed by the DGGI that the appellant are engaged in the business of providing labour / manpower to construction companies. The building construction company enters into a "Work Order Agreement" with the appellant and as per work order agreement, the construction company appointed the appellant as a "Contractor" for the construction work such as RCC labour work, brick work, plaster work etc at their various projects. The said activities undertaken by the appellant qualify as taxable services in terms of Section 2(108) read with the definition of "Service" as given under Section 2(102) read with Section 7(1) of the CGST Act, 2017 *ibid*. Further, as per the provisions under Section 39 of CGST Act, 2017 read with Rule 59 of CGST Rules, 2017 amended from time to time are applicable on the appellant and accordingly they were required to furnish GST-1M and GST-3B returns for every month and the provisions under Section 9 of the CGST Act, 2017 as amended from time to time make the appellant bound to discharge their tax liability for every month.

On the examination of the information available at GST database, records submitted / procured during the inspection visit on 20.01.2020 by DGGI, it was revealed that the appellant have filed their GSTR-1M for the period April-19 to December-2019, before initiation of the investigation. Further, the appellant neither filed their GSTR-3B returns nor discharging their GST liability for the period from April-2019 to Dec-2019 and the GST liability worked out to be Rs. 32,43,386/-.

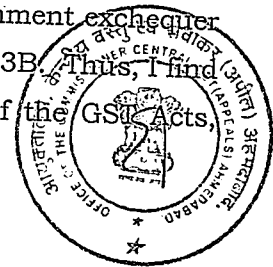


From the above I find that during the investigation and on being specifically pointed out by DGGI, the appellant have discharged their GST liability for the period from April-2019 to December-2019 by filing the GSTR-3B returns. The details are, for the month April-2019, GSTR-3B filed on 22.01.2020, for May-2019 on 28.01.2020, for June-2019 on 28.01.2020, July-2019 on 28.01.2020, August-2019 on 28.01.2020, Sept-2019 on 12.03.2020, Oct-2019 on 12.03.2020, Nov-2019 on 12.03.2020 and Dec-2019 on 12.03.2020. Thus, it is clearly revealed from the investigation that the appellant had collected GST but not deposited the same to the Govt. exchequer during the said period. If this investigation were not conducted, then the appellant would not have deposited the same to the government exchequer. However, the appellant have paid / discharged their GST liability of Rs. 32,43,386/- only after being pointed by the DGGI. This shows that despite having knowledge of CGST Acts & Procedures, the act of other than fraud, mis-declaration or suppression by the taxpayer shows the contravention of provisions with intent to evade tax payment of GST on the part of the appellant.

8.1 Further, as per the provisions of Section 7(1), the services provided by the appellant to their clients were supply of taxable Service. By virtue of provisions under Section 9(1) of the CGST Act, 2017, the appellant was under obligation to pay the Goods and Services Tax at applicable rate on supply of said goods / services to their clients.

8.2 The provisions under Section 13 of the CGST Act, 2017 stipulates that the payment of Goods and Service Tax payable on supply of the service should be either the date of issue of invoice or the date of receipt of payment whichever is earlier. Accordingly, I find that the appellant was under obligation to make payment of GST at the time as stipulated in Section 13 of the GST Acts, 2017.

Further, I find that the value of a supply of services shall be the transaction value as per provisions under Section 15 of the GST Act, 2017, which is the price actually paid or payable for the said supply, where the supplier and the recipient of the supply are not related and price is the sole consideration of supply. In the instant case, I find that the appellant have collected GST but not paid GST to the government exchequer and also failed to discharge their actual taxable income in their GSTR-3B. Thus, I find that the appellant have contravened the provisions of Section 15 of the GST Acts, 2017.



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8.3 Further, section 39 of the GST Acts, 2017 lays down that every registered person should file a return giving details of outward supply made by them, inward supply received by them including the ITC available with them.

Rule 61 of the CGST Rules, 2017, as amended to be read as under:

"61. Form and manner of submission of monthly returns- (1) Every registered person other than a person referred to in Section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under Section 10 or Section 51 or, as the case may be, under Section 52 shall furnish a return specified under sub-section (1) of Section 39 in FORM GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.

As per the provisions under Section 13 of GST Acts, 2017 read with rule 61 of the CGST Rules, 2017, I find that the appellant should have filed in such form and manner as may be prescribed GSTR-3/GSTR-3B returns, however, they have knowingly failed to file the correct stipulated GSTR-3B returns from the period from April-2019 to December-2019.

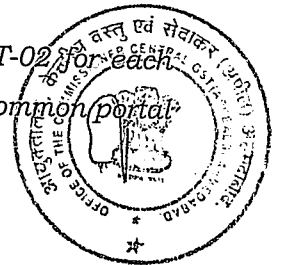
8.4 Payment of tax is mandatory under the provisions of Section 49 of the GST Acts, 2017 for taxable supplied services and under Rule 85, 86 & 87 of the CGST Rules, 2017. Rules 85, 86 and 87 of CGST Rules, 2017 are as under:

"Rule 85. Electronic Liability Register:

- 1. The electronic liability register specified under sub-section (7) of the Section 49 shall be maintained in FORM GST PMT-01 for each person liable to pay tax, interest, penalty, late fee or any other amount on the common portal and all amount payable by him shall be debited to the said register.*
- 2.*
- 3. Subject to the provisions of section 49, payment of every liability by a registered person as per his return shall be made by debiting the electronic credit ledger maintained as per Rule 86 or the electronic cash ledger maintained as per Rule 87 and the electronic liability register shall be credited accordingly.*

Rule 86. Electronic Credit Ledger :

- 1. The electronic credit ledger shall be maintained in Form GST PMT-02 for each registered person eligible for input tax credit under the Act on the common portal.*



and every claim of input tax credit under the Act shall be credit to the said ledger.

2. The electronic credit ledger shall be debited to the extent of discharge of any liability in accordance with the provisions of Section 49.

Rule 87. Electronic Cash Ledger :

1. The electronic cash ledger under sub-section (1) of section 49 shall be maintained in Form GST PMT-05 for each person, liable to pay tax, interest, penalty, late fee or any other amount, on the common portal for crediting the amount deposited and debiting the payment there from towards tax, interest, penalty, fee or any other amount."

In view of the above, it appeared that the appellant have knowingly failed to pay the tax in gross violation of Section 49 of the GST Acts, 2017 read with Rule 85, 86 & 87 of the CGST Rules, 2017 & Gujarat GST Rules, 2017.

8.5 Determination of Tax under Section 73 of the CGST Act, 2017:

Section 73 : Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts:

"(1) where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilized for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made there under.

(2) The proper officer shall issue the notice under sub-section(1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section(1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice of such person under sub-section(1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section(1) are the same as are mentioned in the earlier notice.



(5) The person chargeable with tax may, before service of notice under sub-section(1) or, as the case may be, the statement under sub-section(3), pay the amount of tax alongwith interest payable thereon under section 50 on the basis of his own ascertaining of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the under the provisions of this Act or the rules made there under.

(7) Where the proper officer is of the opinion that the amount paid under sub-section(5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under-section(1) or sub-section(3) pay the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

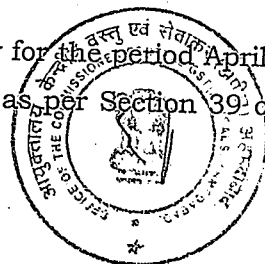
(10) The proper officer shall issue the order under sub-section(9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilized related to or within three years from the date of erroneous refund.

(11)Notwithstanding anything contained in sub-section (6) or sub-section(8), penalty under sub section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

8.6 I further, refer to Self-assessment as defined under Section 59 of the CGST Act, 2017 read with Section 59 of the GGST Act, 2017:

“59. Self-assessment: Every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under Section 39.”

I find that the appellant also failed to self-assess the GST liability for the period April-2019 to December-2019 and failed to file the stipulated returns as per Section 39 of the GST Acts, 2017.



8.7 On bare perusal of the legal provision under Section 73, it is apparent that in a case where it appears to a proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by any reason other than fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax, which has not been paid or has been short paid or to whom refund has been erroneously made or who has wrongly availed or utilised input tax credit requiring him to show cause as to why he should not pay the amount specified in the notice along with the interest payable thereupon under Section 50 and a penalty equivalent to the ten percent of tax or ten thousand rupees, whichever is higher specified in the notice.

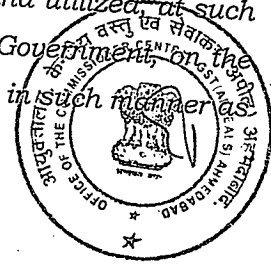
8.8 Further, I refer to the Section 50 of the CGST Act, 2017 under which interest on delayed payment has been stipulated as under:

"50. (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

PROVIDED that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger.

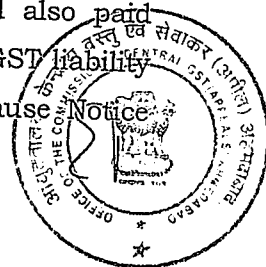
(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) Where the input tax credit has been wrongly availed and utilized, the registered person shall pay interest on such input tax credit wrongly availed and utilized, at such rate not exceeding twenty four per cent., as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.



8.9 I find that in the instant case, the appellant is registered with the department and they were making taxable supplies and in terms of Section 9, though they were levying and collecting GST, but were not discharging their tax liability as stipulated under Section 13 of the Act. They, however, subsequently filed their GSTR-3B returns for April-2019 to December-2019 and discharged their tax liability of Rs. 32,43,386/- (Rs. 2,58,140/- through ITC and paid Rs. 29,85,246/- through cash) by filing GSTR-3B for the period April-2019 to December-2019 on 22.01.2020, 28.01.2020, 11.03.2020 and 12.03.2020. Thus, the tax payments for these period as well as the statutory returns were filed subsequent to the initiation of investigation by the DGGI, before issuance of SCN dtd 30.06.2021 and total evasion of GST for the period April-2019 to December-2019 on the entire income received towards making taxable supplies by the appellant came to the knowledge of the department only due to specific investigation. From the above, I find that the appellant have failed to discharge their GST liability in due time, they have made themselves liable to pay GST liability under section 73 of the GST Act, 2017 by act of other than fraud, mis-declaration or suppression by the appellant with interest on the same under Section 50 of the CGST Act, 2017. The fact about collecting and not depositing GST liability was detected only when the department initiated the present investigation. Various courts including the Apex Court have clearly laid down the principle that tax liability is a civil obligation and therefore, the intent to evade payment of tax cannot be established by peering into the minds of the tax payer, but has to be established through evaluation of tax behaviour. The onus on the tax payer to voluntarily make information disclosure is much greater in a system of self-assessment. In this case, it revealed that the appellant intended to evade payment of GST by an act of omission in as much as the appellant though being well aware of the unambiguous provisions of the CGST Act, 2017 and rules made thereunder, failed to disclose to the department at any point of time, their taxable income on which GST was collected by not paid by them, by way of not filing their GSTR-3B before initiation of the investigation.

I find that from the submissions and records available, the appellant have already paid their GST liability before issuance of SCN dated 30.06.2021 and also paid interest amounting to Rs. 2,79,536/- vide DRC-03 dated 02.07.2021 for GST liability for the period April-2019 to December-2019 after issuance of Show Cause Notice dated 30.06.2021.



Further, the H'ble Jharkhand High Court in the case of M/s. Mahadeo Construction have stated that -

"Liability of interest is automatic, but the same is required to be adjudicated in the event on assessee disputes the computation or very levibility of interest, by initiation of adjudication proceedings under Section 73 or 74 of the CGST Act. In our opinion, till such adjudication is completed by the Proper Officer, the amount of interest cannot be termed as an amount payable under the Act or the Rules."

9. I find that, in the impugned order, the interest has been demanded on the entire amount of GST payable. As per Section 50 of the CGST Act 2017, the interest shall be levied on the portion of the tax that is paid by debiting the electronic cash ledger except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period. The sub section (1) of Section 50 provides for interest on delayed payment of tax, which is reproduced below:

"SECTION 50. Interest on delayed payment of tax. — (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger".

[As per Section 112 of the Finance Act, 2021 this amendment has been with effect from 1st June, 2021 retrospectively from 1.7.2017, which has been notified vide Notification No. 16/2021-Central Tax, dated 01.06.2021.]

10. From the plain reading of the above substituted Section 50, it is clear that the interest under Section 50 of the CGST Act, 2017 can only be levied on the net tax liability and not on the gross tax liability where the supplies made during the tax period are declared in the return after the due date. However, where such returns are furnished after commencement of any proceedings under Section 73 or Section 74 in respect of the said period, then interest shall be payable on the entire amount. In this case, I find that, for the period April-2019 to December-2019, the returns were filed by the appellant before commencement of proceedings under Section 73. Therefore, in terms of amended Section 50, which was given retrospective effect, the interest shall



be payable only on the net cash tax liability (i.e that portion of the tax that has been paid by debiting the electronic cash ledger or is payable through cash ledger). I, therefore, find that the demand of interest on gross tax payable in the present case, is not legally sustainable and order to recover interest only on the net cash tax liability. In the present case, I find that the appellant had discharged the entire tax liability of Rs.32,43,386/- (Rs. 2,58,140/- through ITC and paid Rs. 29,85,246/- through cash) while filing GSTR-3B returns for the period April 2019 to December 2019 before issuance of SCN dated 30.06.2021 and also paid interest of Rs. 2,79,536/- on GST liability vide DRC-03 dated 02.07.2021 through electronic cash ledger, which is required to be appropriated against the interest demanded. Therefore, I uphold that interest is payable only on the net cash tax liability under Section 50 of the GST Acts, 2017 in the present case on the above demands.

10.1 From the above discussions, I, however, find that the demand would be sustainable under Section 73(1) of the CGST Act, 2017 on the grounds discussed above. I, therefore, in terms of Section 73(1) of the CGST Act, 2017, uphold the confirmation of demand to be recovered with interest as per Section 50 of the GST Acts, 2017.

10.2 I also refer to the Section 122 of the CGST Act, 2017 -Penalty for certain offenses

(1) Where a taxable person who -

(i) ...

(ii) ...

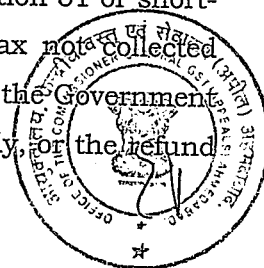
(iii) collects any amount as tax but failed to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due:

(v) to (xxi)

he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under Section 51 or short-deducted or deducted but not paid to the Government or tax not collected under Section 52 or short-collected or collected but not paid to the Government or input tax credit availed of or passed or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

(1A)



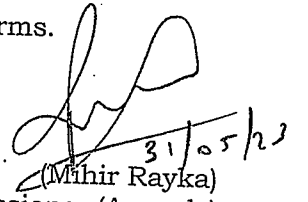
F.No. : GAPPL/ADC/GSTP/2433/2022-APPEAL

In this regard, I uphold that penalty under Section 73(1) read with section 73(9) & 73(11) of CGST Act, 2017 read with Section 73(1), 73(9) & 73(11) of GGST Act, 2017. Therefore, I hold that no penalty under Section 122(1)(iii) & 122(2)(a) of CGST Act, 2017 read with Section 122(1)(iii) & 122(2)(a) of GGST Act, 2017 can be imposed in terms of Section 75(13) of the CGST Act, 2017 read with similar provision under Section 75(13) of GGST Act, 2017.

11. In view of the above, I uphold the demand of tax liability of Rs.32,43,386/- along-with interest at applicable rate and penalty under Section 73 of the GST Acts, 2017 as discussed above.

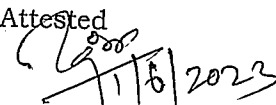
12. In view of the above discussions, I do not find any merit in the contention of the appellant so as to intervene in the impugned order passed by the adjudicating authority. Accordingly, I find that the impugned order of the adjudicating authority is legally correct and proper and hence uphold to the above extent. Thus, I reject the present appeal of the appellant on the above grounds.

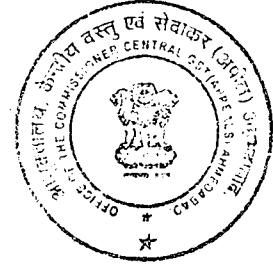
13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the *appellant* stands disposed of in above terms.


(Mihir Rayka)

Additional Commissioner (Appeals)
Date: 31.05.2023

Attested


(TEJAS J MISTRY)
Superintendent (Appeals)
Central Tax, Ahmedabad.



By R.P.A.D.

To,

M/s. Kauni Engineers and Contractor (GSTIN : 24AAGFK7969J1ZR),
C/113, Ronak Apartment, Near Thaltej Post Office, Ahmedabad - 380 059

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner [Appeals], CGST & C. Ex., Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-North.
4. The Additional Commissioner, CGST & C.Ex., Ahmedabad-North
5. The Deputy/ Assistant Commissioner, CGST & C. Ex, Division-VII [S.G.Highway-East], Ahmedabad-North.
6. The Superintendent [Systems], CGST (Appeals), Ahmedabad.
7. Guard File/ P.A. File.

